STEAGALD v. UNITED STATES

No. 79-6777

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GARY KEITH STEAGALD, PETITIONER v. UNITED STATES OF AMERICA

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Title

BRIEF FOR THE UNITED STATES

Text

QUESTION PRESENTED

Whether evidence seized in a residence leased to one of petitioner's co-defendants should have been suppressed because law enforcement officers entered, not with a search warrant, but under the authority of an arrest warrant for a fugitive whom they had reason to believe was present.

OPINIONS BELOW

The opinion of the court of appeals (A. 20-34) is reported at 606 F.2d 540. A subsequent, modifying opinion (A. 35-37) is reported at 615 F.2d 642.

[*6] **JURISDICTION**

The judgment of the court of appeals was entered on November 13, 1979. A petition for rehearing was granted in part, and the original opinion was modified on April 14, 1980. On May 13, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including June 13, 1980. The petition was filed on that date and granted in part on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiracy to commit that offense, in violation of 21 U.S.C. 846. He was sentenced to five years' imprisonment, to be followed by a three-year special parole term. [1]
[*7]

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[1] Petitioner was indicted with three co-defendants (A. 3-5). He originally went to trial with co-defendant Hoyt Gaultney in April 1978. After trial began, the district court granted petitioner's motion for a mistrial and a severance (A. 2), and the trial proceeded with Hoyt Gaultney as the lone defendant. Gaultney was convicted on all three counts of the indictment, which charged him with possessing cocaine with intent to distribute it, conspiracy to commit that offense, and importation of cocaine, in violation of21 U.S.C. 952Petitioner and the two remaining co-defendants, Kathy Gaultney and James Smith, were tried together a month later. At the close of the government's evidencE, the district court granted a judgment of acquittal to Smith and Kathy Gaultney but denied petitioner's motion for a similar disposition (Tr. 276). The court of appeals affirmed petitioner's convictions and those of Hoyt Gaultney in a joint opinion.

"Tr." refers to the trnascript of petitioner's trial, which comprises two consecutively paginated volumes. "H. Tr." refers to the transcript of suppression hearing, which includes three separately paginated volumes.

1. The evidence at petitioner's trial and at the trial of co-defendant Hoyt Gaultney showed that petitioner and Gaultney operated a scheme to distribute large quantities of cocaine that had been smuggled into this country from Colombia, South America. Petitioner and Gaultney used a dummy company, Rosen Import Co., as a front for their illicit activities. The cocaine was concealed in the hollowed-out wooden bases of lamp tables imported from Colombia. Acting as the manager of Rosen Import, petitioner retained a customs house broker to arrang for clearing the tables through customs. Through the broker, petitioner also hired a delivery company to take the tables to a warehouse petitioner had leased in Lawrenceville, Georgia.

When the tables were delivered, petitioner accepted and signed for the shipment, paid the freight charges with a check drawn on the import company's account, and received a copy of the delivery company's waybill as a receipt. The cocaine was then removed from the lamp tables and taken to a lakeside cabin in Buford, Georgia, leased by petitioner's co-defendant James Smith.

A search of Smith's cabin on January 18, 1978, uncovered approximately 43 poinds of [*8] almost pure cocaine, with a wholesale value of more than $ 2.5 million. also found in the cabin were the copy of the freight company waybill received by petitioner when the tables were delivered to the Lawrenceville warehouse and two blank checks on the import company account, bearing the next two consecutive numbers to that on the check used by petitioner to pay the freight charges. A subsequent search of the Lawrenceville warehouse revealed another pound of cocaine still hidden in one of the table bases (A. 24 & n.4, 28-30; Tr. 18-28, 50-54, 58-60, 64, 98-100, 117- 124, 133-138, 151, 157-162, 167-172, 177, 181, 184, 191, 193, 197-198, 209-218 (220-227).

2. The circumstances surrounding the search of the cabin leased to James Smith are described in the opinion of the court of appeals (A. 21-24) and the magistrate's report and recommendation on the motion to suppress evidence filed by petitioner and his co-defendants (A. 6-11). In early January 1978, DEA Agent Joseph Rassey was contacted by an informant whom he had known for about five years and who had provided him with information leading to seven arrests for drug-related offenses, three of which resulted in convictions and four [*9] of which were still pending (A. 13, 21 n.2; 1 H. Tr. 16-18; 2 H. Tr. 33-36, 51). The informant said he might be able to locate "Ricky Lyons," whom he believed to be wanted by the DEA, and another person named "Jimmy," whom he also believed to be a fugitive. On Saturday, January 14, 1978, the informant called Agent Rassey and said that he had received a call from Jimmy, who was using the alias "Carl James" and who was wanted on Georgia state charges (1 H. Tr. 16-17; 2 H. Tr. 36-37). According to the informant, Jimmy had given him a telephone number in the Atlanta, Georgia, area where Jimmy and Ricky Lyons could be reached within the next 24 hours. Agent Rassey spoke to the informant again on Monday morning, January 16. The informant said he had just talked with Jimmy by telephone and had heard Lyons' voice in the background (2 H. Tr. 37-38). [2]

Shortly after this conversation with the informant, Agent Rassey called DEA Agent Kelly Goodowens in Savannah, Georgia, and relayed the information he had received from the [*10] informant (1 H. Tr. 16-18; 2 H. Tr. 37). Agent Goodowens was aware that six months earlier Ricky Lyons had been indicted in the United States District Court for the Southern District of Georgia on charges of marijuana smuggling. On further investigation, Agent Goodowens learned that a federal warrant had been issued for Lyons' arrest and that he remained a fugitive (A. 22). The DEA considered Lyons armed and dangerous (1 H. Tr. 14; 2 H. Tr. 32). Special Agent Wayne Smith of the DEA Atlanta office had participated in an earlier investigation in which Lyons was involved and knew him to be a "fairly violent person" (2 H. Tr. 53-54). Weapons and dynamite had been found in Lyons' residence on past occasions (ibid.) .

Soon after his conversation with Agent Rassey, Agent Goodowens learned through the Southern Bell Telephone Company that the telephone number that Jimmy had given to the informant was listed to Richard E. Fisher at 6291 Cary Drive, Buford, Georgia (1 H. Tr. 18-19). Goodowens enlisted the help of the Gwinnett County Police to locate the address but they were unable to find it that day (Monday, January 16) (1 H. Tr. 19). On Wednesday morning, January 18, 1978, Agent Goodowens [*11] requested Southern bell to obtain from its workmen detailed directions to the address at which the Fisher telephone had been installed (1 H. Tr. 19-20). The telephone company provided

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[2] The informant had known both Jimmy and Lyons for several years and told Agent Rassey that he could definitely recognize their voices (2 H. Tr. 37-38, 47).

this information early in the afternoon of January 18, and, with the aid of the Gwinnett County Police, Agent Goodowens determined that the correct address was on Cary Court, not Cary Drive (1 H. Tr. 20).

At approximately 2:00 p.m. the same afternoon, Agent Goodowens again spoke with Agent Rassey, who reported that he had had several conversations with his informant during the period from January 16 to January 18, 1978, that he had talked with the informant most recently on the morning of January 18, and that in each of these conversations the informant had said that he was keeping in touch with Jimmy and that Jimmy and Lyons were still located at the telephone number reported earlier. According to the information relayed by Agent Rassey, a total of four or five persons were staying at the house where Jimmy and Lyons were, and the informant did not know how much longer Jimmy and Lyons would be there (A. 7; 1 H. Tr. 18, 20, 48, 78; 2 H. Tr. 5, 38- 39, 48-49).

Because Agent Goodowens had never seen [*12] Ricky Lyons, he asked Agent Wayne Smith to assist in the arrest. At approximately 4: 00 p.m. on January 18, Agent Goodowens and Agent Smith, together with assisting federal and state officers, went to the Cary Court address, whcih was in a rural area of Georgia, near a lake (1 H. Tr. 21, 45, 79; 2 H. Tr. 3-5, 53-54, 103). Two buildings appeared to share a mailbox on which the address was printed. One, an A-frame, appeared unoccupied. The other, a small cabin, had smoke coming from the chimney and an old Volkswagen parked in the driveway (1 H. Tr. 23-24). As Agents Goodowens and Smith and another officer approached the cabin, they noticed two men squatting behind the Volkswagen. The agents asked the men for identification. Agent Smith at first thought that one of the men was Lyons, but he quickly realized that he was mistaken. The man identified himself as Hoyt Albert Gaultney; the second man, petitioner, produced a driver's license in his own name. The agents knew that Gaultney had been arrested previously, and they believed him to be dangerous. They frisked him and discovered a gun concealed in his pants (1 H. Tr. 24-26, 36, 56-57, 69, 71; 2 H. Tr. 55-56, 75, 103-106). [*13]

As soon as Agent Smith realized that neither man was Lyons, he proceeded to the cabin. He knocked on the door, and Kathy Gaultney, Hoyt Gaultney's wife, answered. Agent Smith identified himself as a police officeer and said that he was there to execute an arrest warrant. He asked if he could enter the cabin, and she acquiesced. Agent Smith inquired whether Ricky Lyons was present, and Kathy Gaultney responded, "No one by that name here. I'm here by myself." While another officer watched Kathy Gaultney, Agent Smith made a sweep search of the cabin for Lyons (1 H. Tr. 29; 2 H. Tr. 55-57, 76-77).

The cabin contained four rooms, a combination kitchen-living room into which the officers had entered, two bedrooms, and a bathroom. Agent Smith first looked into the bathroom and then proceeded to one of the bedrooms, from which a light was shining beneath the door. In this room, Agent Smith saw a sewing table, on whcih were a set of triple-beam balance scales and a transparent plastic bag containing a white powder. Agent Smith then completed his sweep search of the cabin; he found neither Lyons nor anyone else. Agent Smith returned to the Volkswagen outside and told Agent Goodowens [*14] that he had not found Lyons but that he believed he had found some cocaine.

Agent Smith then drove to Atlanta to obtain a search warrant for the cabin. While he was gone, Agent Goodowens walked into the first bedrom to verify Smith's discovery. Agent Goodowens noticed a suitcase lying open on the bed. It contained an open green garbage sack in which several bags of white powder were plainly visible. [3] Petitioner and the Gaultneys were then arrested and brought into the living room to await the search warrant (1 H. Tr. 29-33, 63, 69, 96-97; 2 H. Tr. 56-63, 72, 76-78).

While they were waiting, Hoyt Gaultney asked to speak privately with DEA Agent James Williams in the second bedroom (i.e., not the one in which the cocaine had been discovered). Fearing that Gaultney might attempt to gain access to a weapon, Agent Goodowens first searched the room, including a grey suitcase in the bedroom closet. Inside the suitcase he found "what appeared to be drug paraphernalia" (1 H. Tr. 37; see also id. at 110-112). [4] He

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[3] Agent Smith had not noticed the suitcase (2 H. Tr. 78).

[4] Further investigation after a search warrant was obtained revealed that the suitcase contained approximately one pound of a white, powdery, non-controlled substance called mannitol, which is used as a cutting agent for cocaine (1 H. Tr. 37-38).

also found a knife lying on top of a bunkbed. Soon thereafter, Gaultney confessed to Agent Wiliams that [*15] 50 pounds of cocaine were hidden inside the house. He led Agent Williams back to the first bedroom, where he pointed to a brown suitcase in an open closet and said, "there it is" (1 H. Tr. 35-38, 96-97; 3 H. Tr. 4-11, 22, 29-32).

At aproximately 7:25 p.m., a man calling himself "Jimbo" telephoned the cabin and said that he would be returning there shortly. Agent Goodowens, who took the phone call, believed that Jimbo was the person he and the other officers knew as Jimmy. (Earlier, the agents had asked Hoyt Gaultney about Jimmy, and Gaultney responded, "That's Jimbo. He's staying here" (1 H. Tr. 100-101).) When Agent Goodowens told the group that Jimbo would be arriving soon, Hoyt Gaultney said that Jimbo "would probably be carrying a gun and he would not hesitate to use it under the right circumstances" (2 H. Tr. 7).

Five minutes later, Agent Smith called from Atlanta and told the officers that the search warrant had been [*16] issued. During this telephone conversation, petitioner's co-defendant James Smith and his wife arrived at the cabin in a pick-up truck. Agent Goodowens frisked Smith when he entered the cabin and found that he was carrying a gun. Smith identified himself only as "Jimmy." He also produced a driver's license in the name of "Carl James." [5] The officers then proceeded to search the house in accordance with the warrant. They found narcotics paraphernalia, weapons, and approximately 43 pounds of almost pure cocaine. When Agent Smith returned to the cabin later in the evening, he searched James Smith's truck for identification. He found instead a briefcase containing pills, marijuana, Polaroid photographs of plastic bags of white powder and what appeared to be bales of marijuana, two or three letters addressed to Ricky Lyons, and a stolen handgun. The agents finally learned Jimmy's true identity when he was processed at the DEA office later that night (1 H. Tr. 34-35, 68, 102-110; 2 H. Tr. 7-8, 21-23, 66-70, 95-97, 99). [6]
[*17]

3. Petitioner and his co-defendants moved to suppress all the evidence discovered during all the searches. They contended that Agent Smith's initial entry into the cabin was improper and that all the evidence subsequently discovered was the fruit of this unlawful entry. At the suppression hearing, counsel for the Gaultneys asked agent Goodowens whether he could have obtained a search warrant before entering the cabin. The agent responded, "I don't know. A search warrant for what, sir? I had an arrest warrant" (App., infra, 1a). When questioned further, he stated that he did not know how long Ricky Lyons was supposed to remain at th CAry Court address but that there had been no "physical hindrance" that presented him from obtaining a search warrant (id. at 2a).

The district court, adopting the exhaustive findings and recommendations of the magistrate who presided at the suppression hearing (A. 6-17), held that the initial entry was lawful because the officers had an arrest warrant for Lyons and a reasonable belief that he was at the Cary Court address. The court suppressed the evidence found in the grey suitcase opened by Agent Goodowens, before a search warrant was obtained, [*18] in the bedroom where Gaultney gave his statement to Agent Williams. The court also suppressed the evidence seized from James Smith's pick-up truck. In all other respects, the court denied defendans' motion.

The court of appeals affirmed on the basis of its earlier decision in United States v. Cravero, 545 F. 2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977). That case held that a police officer who possesses a valid arrest warrant and who reasonably believes that the subject of the warrant is in a third party's residence need not obtain a search warrant to enter the premises for the purpose of arresting the subject. Judge Kravitch dissented. She thought that the agents' basis for believing that Lyons was at the cabin was insufficient to satisfy the Cravero "reasonable belief" standard and that, in any event, Cravero had stated "a rule of questionable validity and wisdom" (A. 32-34, 37).

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[5] Earlier, the agents had found a traffic ticket on a table in the cabin. It had been issued to "Carl James" (1 H. Tr. 101).

[6] The following day, the agents procured a second search warrant to search the contents of a plaid suitcase and other items found within the house. Subsequently, law enforcement officers obtained two additional warrants authorizing the search of the Lawrenceville warehouse and a storage bin at another warehouse (1 H. Tr. 38-39, 66; 2 H. Tr. 70-71).

SUMMARY OF ARGUMENT

The petition in this case presents an important and unsettled question of Fourth Amendment law. Last Term, in Payton v. New York, 445 U.S. 573 (1980), the Court held that, in the absence of either exigent [*19] circumstances or consent, the Fourth Amendment prohibits law enforcement officiers from making warrantless entries into a suspect's home in order to arrest him on criminal charges. The Court concluded that arrest entries into a suspect's residence are not constitutionally permissible unless the officers have (1) an arrest warrant based on a magistrate's determination that there is probable cause to believe that the person named in the warrant committed a crime, and (2) reason to believe that the suspect is present inside the premises. The substantive Fourth Amendment question presented in this case is whether something more than an arrest warrant and reason to believe is necessary before officers may enter the premises of a "third party" for the purpose of arresting a suspect. Relying heavily on Payton v. New York, supra, petitioner contends that in this situation only a search warrant specifying the premises to be entered is sufficent to satisfy the Fourth Amendment privacy interests of the occupants of third party premises. While the issue is a close one, we disagree with petitioner's contention. This is not, however, an appropriate case to address the merits of the [*20] Fourth Amendment issue, both because there is a serious question whether petitioner's Fourth Amendment rights were implicated by the entry and because. in the circumstances of this case, the exclusionary rule should not be applied to suppress the evidence acquired as a result of the entry.

I

There is a substantial threshold question whether petitioner had any valid interest in the Cary Court premises that was protected by the Fourt Amendment and that may have been violated by the DEA agents' entry and ensuing sweep search. Petitioner and his co-defendants were charged with possession of the cocaine found inside the cabin, but the record contains little or no evidence demonstrating petitioner's privacy interest in the cabin, which he was not in at the time of the entry. Because this case was tried and the resulting convictions were affirmed before this Court's decision in United States v. Salvucci, No. 79-244 (June 25, 1980), the courts below proceeded on the premise that petitioner had "automatic standing" to challenge the entry and search, and did not inquire into petitioner's connection with the premises in order to determine whether he had a reasonable expectation of privacy [*21] in any of the areas of the cabin where incriminating evidence was found. Accordingly, the Court may wish to remand the case for further proceeding on this issue.

II

The entry and search in this case occurred in January 1978. At that time, the agent's conduct was lawful under established Fifth Circuit precedent. See United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977). The decision in Payton v. New York, supra, which was rendered more than two years later, marked a sharp break in the law regarding arrest entries.

Petitioner, however, asks the Court to interpret and extend Payton should be so interpreted an extended, it should consider whether Payton, whatever its implications, should be applied retroactively to suppress the fruites of the search in this case. See Bowen v. United States, 422 U.S. 916 (1975); Michigan v. Payne, 412 U.S. 47 (1973); DeStefano v. Woods, 392 U.S. 631 (1968); Stovall v. Denno, 388 U.S. 293 (1967). In each of the foregoing cases, the Court declined to decide whether an earlier ruling should be extended [*22] to govern law enforcement conduct occurring prior to rendition of the decision but in circumstances somewhat different from those considered in the previous case. Instead, the Court concluded in each instance that retroactive application of the earlier decision was inappropriate and terminated its inquiry at that point.

Unlike the foregoing cases, however, petitioner's legal position arguably could be adopted even if Payton, the earlier decision on which he relies, had been decided differently. Nevertheless, Payton represents an important development in Fourth Amendment law governing arrest entries. Before exploring the legal ramifications of that development and excluding evidence obtained as a result of law enforcement conduct that fails to measure up to evolving constitutional standards, the Court should await a case arising from a post-Payton search, in which the

police were already on notice that the Cravero rule might no longer be good law. Thus, unless Payton is to be applied retroactively, suppression of the challenged evidence is inappropriate here.

Under settled principles, Payton should not be given retroactive effect. No possible deterrent purpose would be served [*23] by excluding the fruits of searches and seizures that law enforcement officers did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. Furthermore, the extent of reliance by law enforcement officers ont he pre-Payton rule and the burden on the administration of justice that would flow from retroactive application of justice that would flow from retroactive application also militate in favor of applying Payton prospectively only. The Court in Payton acknowledged that the majority rule favored warrantless arrest entries and that the practice was "longstanding" and "widespread." No other new Fourth Amendment ruling has been held retroactive by this Court, and there is no reason to treat Payton differently.

III

Petitioner argues that the protection afforded by an arrest warrant is insufficient in the case of arrest entries into third party dwellings. It is his position that only a search warrant based on a magistrate's particularized determination that there is probable cause to believe that the suspect is present in a third party's residence is sufficient to justify the intrusion upon the third party's privacy interests. While petitioner's [*24] argument has considerable force, we submit that both history and practical considerations counsel against adoption of his position.

At common law, it appears to have been well settled that a constable could enter the premises of a third party in order to execute an arrest warrant for a felon, so long as he had reason to believe that the person named in the warrant was present. It is therefore highly unlikely that the Framers intended to invalidate such entries as unreasonable when they enacted the Fourth Amendment.

In addition, an arrest warrant does provide a third party homeowner with some of the same protections afforded by a search warrant. It is issued only after the magistrate has found prabable cause to believe that the named individual has committed a crime, and it constitutes evidence of the officer's authority and purpose. At the same time, we recognize that interposition of a magistrate to make a particularized determination that the suspect is present in a third party's house provides addiitonal protection not available through an arrest warrant. But the question remains whether the increased protection to privacy interests outweighs the substantial practical problems [*25] involved in complying with a search warrant requirement. Unlike things, people -- particularly people suspected of crime -- are highly mobild. A warrant authorizing entry of a particular place to search for a particular person is considerably more likely to be stale at the time it is issued, or shortly thereafter, than one authorizing a search for inanimate objects. Furthermore, it may be difficult, if not impossible, for the police to know the suspect's relationship with the premises and how long he is likely to remain there. In light of these considerations, we submit that an arrest warrant, coupled with the officer's determination of reason to believe, is sufficient to satisfy the Fourth Amendment's standard of reasonableness.

ARGUMENT

I. THE RECORD STRONGLY SUGGESTS THAT THE ENTRY INTO THE CABIN WHERE THE COCAINE WAS FOUND, EVEN IF UNLAWFUL, DID NOT VIOLATE PETITIONER'S FOURTH AMENDMENT RIGHTS

If petitioner had a reasonable and legitimate expectation of privacy in the Cary Court cabin, that expectation was implicated when Agent Smith entered in an attempt to execute the arrest warrant for Ricky Lyons. There is a substantial threshold question, however, concerning [*26] whether petitioner in fact had such an expectation. In the absence of such an expectation, petitioner's Fourth Amendment rights would not have been violated by the entry and ensuing sweep search, regardless of the legality of the agents' conduct as far as petitioner's co-defendants were concerned. Rakas v. Illinois, 439 U.S. 128 (1978).

The matte of petitioner's expectation of privacy in the Cary Court cabin and, in particular, in the bedroom where Agent Smith discovered cocaine, was not specifically explored at the suppression hearing or at trial. The

indicemtne charged petitioner and his co-defendants with possessing the cocaine found in the cabin (A. 3), and the cae was tried and the resulting convictions were affirmed on appeal before this Court's decision in United States v. Salvucci, No. 79-244 (June 25, 1980). Accordingly, because petitioner was charged with a possessory offense, all participants in the courts below believed he was entitled to "automatic standing" under Jones v. United States, 362 U.S. 257 (1960). For that reason, neither the magistrate nor the district court inquired into petitioner's connection with 6291 Cary Court in order [*27] to determine whether he had a reasonable expectation of privacy in any or all of the areas inside the cabin where incriminating evidence was found.

We hasten to add, however, that at petitioner's trial the government had every incentive to adduce the greatest possible amount of evidence linking petitioner with the cabin. The prosecution was trying, after all, to link petitioner to the cocaine found inside. Even after the thorough, warrant-authorized searches of the cabin and its contents, the government was able to identify only three items of evidence that tender to show that petitioner had even been inside (A. 29). These were:

(1) the copy of the freight waybill (found in the dining area) that petitioner received and signed when the cocaine-laden lamp tables were delivered (Tr. 64);

(2) two blank checks (found in the Kitchen) on the Rosen Import account, for which petitioner was an authorized signator; the checks were numbered consecutively to the check that petitioner has signed and given to the delivery company in payment of the freight charges for delivery of the lamp tables (Tr. 64); and

(3) a sweater belonging to petitioner (also found in the kitchen), which petitioner [*28] asked one of the DEA agents to retrieve for him when he was detained near the Volkswagen, while wearing only slacks and a long-sleeved shirt (Tr. 91-93).

Petitioner argued vigorously on appeal that this evidence, together with the other evidence connecting him to the cocaine distribution scheme, [7] was insufficient to support his convictions. The court of appeals rejected the argument (A. 28-30), and petitioner does not repeat it here, but the very fact that the contention was advanced in the court below and that court thought it necessary to discuss the argument in some detail demonstrates that the evidence of petitioner's connection to the cabin was far from overwhelming.

Certaintly, neither the government nor petitioner presented [*29] any evidence, either at the suppression hearing or at trial, that tender to show hat petitioner lived in the cabin or had stayed there overnight. And, of course, petitioner was not in the cabin when the DEA agents arrived there on January 18. The uncontroverted evidence t both the hearing and the trial established that petitioner's co-defendant James Smith, using the name "Justice Travis," had leased the cabin from its owner, Richard Fisher (2 H. Tr. 68; Tr. 97-106). [8]

Petitioner bears the burden of proving that he had a reasonable and legitimate expectation of privacy in the Cary Court cabin and, especially, in the bedroom where Agent Smith discovered the cocaine. Rawlings v. Kentucky No. 79-5146 (June 25, 1980), slip op. 6; Rakas v. Illinois, supra, 439 U.S. at 131 N.1; Simmons v. United States, 390 U.S. 377, 389-390 (1968). [*30] Because of the state of the law at the time of petitioner's trial, he has not yet been called upon to meet that burden, and he has not done so, Before deciding any of the other questions in this case, the Court may wish to remand it to the district court for a determination whether petitioner had any valid interest in the cabin that was protected by the fourth amendment and that may have been violated by the DEA agents' entry and search on January 18, 1978. See, e.g., United States v. Salvucci, supra, slip op. 11-12; Combs v. United

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[7] The additional evidence against petitioner is summarized in the court of appeals' opinion (A. 28-30). Petitioner arranged and paid for a telephone answering service for Rosen Import Co., and he also arranged and paid for the rental of the warehouse in Lawrenceville, Georgia, where the cocaine-laden tables were delivered. In addition, petitioner arranged and paid for the delivery of the tables to Rosen Import and their passage through customs.

[8] The government's brief in opposition in this case characterized the cabin as "petitioner's residence" (Br. in Opp. 1) and stated that it was "occupied by petitioenr, Gaultney, and Gaultney's wife" (Br. in Opp. 3). However, a closer review of the record in connection with the preparation of this brief has revealed that those statements were mistaken.

States, 408 U.S. 224 (1972). At a minimum, such a remand should be ordered in the event the Court resolves the other matter presented here against the government and therefore reverses and judment of the court of appeals. [9]
[*31]

II. THE CHALLENGED EVIDENCE SHOULD NOT BE SUPPRESSED BECAUSE THE ENTRY AND SEARCH COMPLIED FULLY WITH THE APPLICABLE FIFTH CIRCUIT LAW AT THE TIME IT OCCURRED, AND THIS COURT'S DECISION IN PAYTON v. NEW YORK MARKS A SHARP BREAK IN THE LAW REGARDING ENTRIES FOR THE PURPOSE OF EFFECTING AN ARREST

The search in this case occurred on January 18, 1978. The court of appeals completed its consideration of petitioner's appeal on April 14, 1980. This Court decided Payton v. New York, 445 U.S. 573, on April 15, 1980, more than two years after the search. At the time law enforcement officers entered the Cary Court house in an effort to arrest Richard Lyons, their conduct was lawful under established Fifth Circuit law. The court of appeals had clearly ruled that "when an officer holds a valid arrest warrant and reasonably believes that its subject is within premises belonging to a third party, he need not obtain a search warrant to enter for the purpose of arresting the suspect." United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976), cert. denied, 429 U.S. 1100, 430 U.S. 983 (1977). [10] See also A. 24-25 and cases there cited.
[*32]

In the present case, the existence of a valid warv rant for Lyons' arrest is undisputed. In addition, the court of appeals determined (A. 25) that "the agents had objective grounds for forming a reasonable belief that the fugitive was present at the premises in question when they entered." This Court denied that portion of the petition for certiorari that sought to challenge the latter aspect of the court of appeals' decision. Accordingly, there is no remainv ing controversy regarding the propriety of the entry, at the time it occurred, under the law in the Fifth Circuit.

Moreover, the Fifth Circuit had unmistakably aligned itself with the majority of American jurisdictions which, for many years before Payton, had permitted completely warrantless entries into the dwelling of a person whom the police had probable cause to arrest, whenever law enforcement officers also had reason to believe the person was present in his dwelling. See e.g., United States v. Savage, 564 F.2d 728 (5th Cir. 1977);United States. v. Hofman, 488 F.2d 287 (5th Cir. 1974);United States v. Wysocki, 457 F.2d 1155 (5th Cir.), cert. denied, 409 U.S. 859 (1972). [*33] See also United States v. Williams, 573 F.2d 348, 350 (5th Cir. 1978) (decided four months after the search in this case; the court stated that "unitl the Supreme Court declares otherwise, the question is settled in the fifth Circuit"). See generally Payton v. New York, supra, 445 U.S. at 575-576 & nn. 3, 4, 598-600;id. at 612- 614 (White, J., dissenting); ALI, Model Code of Pre- Arraignment Procedure § 120.6 and accompanying commentary, at 19-21, 306-314 (Proposed Official Draft 1975). Payton effected an important change in the law in the numerous jurisdictions, including the Fifth Circuit, that followed this majority rule.

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[9] Because the district court and the court of appeals sustained the entry and search in this case in reliance on the governing Fifth Circuit law regarding entries into third-party dwellings for the purpose of executing an arrest warrant, the courts below had no occasion to consider whether Agent Smith's entry into the cabin may have been justified by consent or exigent circumstances. These matters, too, should be open to inquiry on remand if the Court resolves the remaining issues against the government.

[10] The court in Cravero stated that its reference to the officers "reasonable belief" about the location of the suspect was intended to embody the same standards of reasonableness contained in the more common "probable cause" formulation. The court explained(545 F.2d at 421):

The test is properly framed ain terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a search warrant. When one says "probable cause", therefore, one also says either "magistrate" or "exigent circumstances." Reasonable belief embodies the same standards of reasonableness but allows the officers, who has already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.

Petitioner now relies heavily on Payton in support of his challenge to Cravero and the other Fifth Circuit precedents, followed by the court of appeals in this case, regarding entries into so-called thirty-party premises on the strength of an arrest warrant for a fugitive who the policy reasonably believe can be found there. See Pet. Br. 14, 18, 28-29, 32-36 He contends that, just as the Fourth Amendment requires something more than probable cause to justify an entry into a suspect's own dwelling for the purpose of arresting [*34] him, so the Amendment requires something more than an arrest warrant and reason to believe a suspect is present to justify an entry into someone else's dwelling for the purpose of effecting an arrest.

Whatever the merits of this interpretation and extension of Payton -- a matter we take up in Point III, Infra -- petitioner's argument should not result in the suppression of evidence in this case. Payton marked a sharp break in the law. The search in this case occurred before Payton and was conducted by officers who acted in good-faith reliance on the con$ trolling precedents in the Fifth circuit (see App., infra, 1a-2a). Although this Court had observed on several earlier occasions that the question resolved in Payton was an open one, [11] law enforcement officers in the fifth Circuit could not have been expected to anticipate this Court's decision more than two years before it was announced and, on that basis, to conform their conduct to the possible ruling requiring a warrant rather than to the rule actually adopted by the court of appeals. This is particularly so because the court of appeals adhered to what was then the majority view on the Payton question. Indeed, more than [*35] half of the federal and state cases cited by this Court in Payton as precursors of its invalidation of "routine" warrantless entries into the dwelling of a suspect for the purpose of arresting him (see 445 U.S. at 575-576 nn. 3, 4) were decided after the search in this case had already occurred. [12]

Petitioner asks the Court to interret and extend Payton and then to apply the legal principles so derived to a search that took place long before the Court spoke in April 1980. The situation thus presented is highly similar to the ones confronted by the Court in Bowen v. United States, 442 U.S. 916 (1975); [*36] Michigan v. Payne, 412 U.S. 47 (1973);DeStefano v. Woods, 392 U.S. 631 (1968); and Stovall v. Denno, 388 U.S. 293 (1967). in each of those cases, the Court was asked to apply a recent decision to events that (i) were somewhat different from the ones actually considered in the previous case and (ii) had occurred before the case was decided. In each instance, the Court turned first to the question whether the precedent invoked should be applied retroactively. Concluding in each instance that retroactive application was inappropriate, the Court declined to decide whether the earlier ruling would in fact have had the effect claimed for it, if the somewhat different factual situation then before the Court had arisen after the earlier decision. [13] The majority opinion in Bowen observed (422 U.S. at 920; citations omitted):

This Court consistently has declined to address unsettled questions regarding the scope of decisions establishing new constitutional doctrine in cases in which it holds those decisions nonretroactive. This practice is rooted in our reluctance to decide constitutional questions unnecessarily.
[*37]

In Bowen, the Court was asked to interpret and extend its decision in Almeida-Sanchez v. United States, 413 U.S. 266 (1973), and to apply that decision to a search that preceded it. Almeida-Sanchez held that the Fourth

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[11] SeeUnited States v. Watson, 423 U.S. 411, 418 n.6 (1976);id. at 432-433J., concuring);id. at 433J., concurring);Gerstein v. Pugh, 420 U.S. 103, 113 n.13 (1975);Coolidge v. New HAmsphire, 403 U.S. 443, 480-481 (1971);Jones v. United States, 357 U.S. 493, 499-500 (1958).

[12] We use the adjective "routine" to refer to those warrantless entries not justified by exigent circumstances, consent, or some other factor apart from probable cause to arrest

[13] Fortuitously, another case presenting the question raised in Bowen, but involving events occurring after the arguably controlling precedent, was decided by the Court on the same day as it decided Bowen. SeeUnited States v. Ortiz, 422 U.S. 891 (1975). Accordingly, the application of the critical precedent to the Bowen situation was made clear by the Court on the very day that the Court refused to apply that precedent to Bowen himself. This was purely coincidental, however. Indeed, although the Ninth Circuit had affirmed Bowen's conviction on the same nonretroactivity reasoning ultimately adopted by this Court the Court nonetheless took pains to admonish the court of appeals for including in its opinion a statement of its views on how the earlier decision of this Court would have affected the outcome had the operative events occurred after, rather than before, that decision. See 422 U.S. at 920-921.

Amendment forbids Border Patrol officers from using roving patrols to search vehicles, without probable cause, at points removed from the border and its functional equivalents. Bowen asked the Court to extend this rule to cover searches at fixed checkpoints away from the border. The Court held that the proper way to dispose of the case was first to decide whether Almeida-Sanchez should be applied retroactively to searches occurring before the case was decided. Having decided that Almeida-Sanchez should not be given retroactive effect (see United States v. Peltier, 422 U.S. 531 (1975)), the Court said it was inappropriate to inquire further into the implications of Almeida- Sanchez for the fixed checkpoint situation.

Similarly, in Michigan v. Payne, supra, the Court was asked to interpret its decision in North carolina v. Pearce, 395 U.S. 711, 723-726 (1969), and to apply that decision to a sentence on a defendant [*38] after a new trial, three requirements must be satisfied: (i) the reasons for the higher sentence "must affirmatively appear" in the record; (ii) "[t]hose reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding;" and (iii) "the factual data upon which the increased sentence is based must be made part of the record" (id. at 726). In Pearce, the State offered no justification for the increased sentence "beyond the naked power to impose it" (ibid.) . The Court therefore did not permit the sentence to stand. in Payne, by contrast, the State and the sentencing judge did advance a purported justification for the increased sentence after a new trial. This Court declined to consider whether that justification was adequate after Pearce, because it held that Pearce should not be applied retroactively to resentencings that occurred before the case was decided. DeStefano v. Woods, 392 U.S. 631 (1968), and its companion case, Carcerano v. Gladden, provide a third example. Petitioners' requests for relief in those cases would have required the Court [*39] to interpret and extend its decisions in Duncan v. Louisiana, 391 U.S. 145 (1968) and Bloom v. Illinois, 391 U.S. 194 (1968), and to apply those decisions to trials held before that "the States cannot deny a request for jury trial in serious criminal cases," and Bloom held that "the right to jury trial extends to trials for serious criminal contempts." 392 U.S. at 632. DeStefano argued that a contempt punishable by one year's imprisonment is sufficiently serious to require a jury trial. Carcerano argued that his right to a jury trial entailed a right not to be convicted except by unanimous verdict. The Court declined to consider whether the Sixth and Fouteenth Amendments would require the results advocated by petitioners, because it held that Duncan and Bloom shoiuld not ber applied retroactively.

Finally, Stovall v. Denno, 388 U.S. 293 (1967), is instructive in this regard. Petitioner there could have been afforded relief only if the Court had interpreted and extended United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), and had applied those cases retroactively. [*40] Wade and Gilbert established the rule that, in order to safeguard the right of a criminal defendant to to safeguard the right of a criminal defendant to the effective assistance of counsel for his defense, identification evidence derived from a post-indictment lineup at which the defendant was not represented by counsel cannot be admitted at the defendant's trial. Stovall asked the Court toexclude identification evidence derived from an informal confrontation with his alleged victim two days after the offense occurred. The Court did not pause to consider whether the rule of Wade and Gilbert should govern confrontations that occur prior to the filing of formal charges against the prospective defendant. Rather, the Court simply held that Wade and Gilbert should not be applied retroactively.

The reasoning of these past cases should control the disposition of the present controversy. Petitioner contends that, because the Court in Payton has held that the Fourth Amendment ordinarily requires some judicial scrutiny before an entry into a suspect's dwelling in order to arrest him, the Amendment also requires some further degree of scrutiny before an entry into a third party's dwelling [*41] to arrest a suspect for whom the police have an arrest warrant and who they have reason to believe is there. In a real sense, petitioner's argument depends on the decision in Payton. He seeks to rely on that decision to change the law of the Fifth Circuit, not only with respect to warrantless arrests of a suspect within his own dwelling, but also with respect to entries for the purpose of executing an arrest to entires for the purpose of executing an arrest warrant in a third-party's dwelling. Before the Court decides whether Payton should be so interpreted and extended, it should consider whether Payton, whatever its implications, should be applied retroactively to the search in this case, which occured more than two years before Payton was decided.

To be sure, the present case may be distinguished in one respect from Bowen, Payne, DeStefano, and Stovall. In each of those cases, the criminal defendant's argument could not conceivably have been accepted if the Court had

decided the earlier, potentially controlling, case differently. For example, Bowen could not have hoped to prevail with respect to fixed checkpoint searches if the Court had endorsed reving patrol searches without [*42] probable cause in Almeida-Sanchez. Payne could not possibly have succeeded in challenging his new sentence as a violation of due process if Pearce had held that the Due Process clause does not impose any constraints on the imposition of a higher sentence after a new trial. The contentions of DeStefano and Carcerano bore a similar relationship to the decisions in Duncan and Bloom, and Stovall's argument likewise would have been rejected a Fortiori if the Court had ruled differently on the post-indictment identification procedures at issue in Wade and Gilbert.

Here, by contrast, petitioner's legal position arguably could be adopted even if the State had prevailed in Payton. In that event, petitioner's contention would be that, however appropriate it may be to dispense with a warrant requirement for an arrest of a suspect in his own dwelling, the independent privacy interest of a third-party in his dwelling nevertheless remains sufficient to necessitate a search warrant before the police may enter to execute an arrest warrant for a suspect who they reasonably believe is present. Scrutiny by a neutral judicial officer is necessary, petitioner could argue, because the entry of a third-party's [*43] dwelling entails an invasion of a legitimate expectation of privacy that exists separate and apart from the justification for arresting a person who happens to be present on the premises.

Notwithstanding this analytical distinction, however, we believe tht the procedure followed in Bowen, Payne, DeStefano, and Stovall should guide the Court's action in the present case. Petitioner seeks to suppress highly relevant evidence seized by law enforcement officers acting in accordance with established law in their jurisdiction -- law that, at the time of the search, at least, was not contrary to any decisions of this Court. In this situation, petitioner should bear the burden of showing a compelling justification for the application of the exclusionary rule. See United States v. Peltier, supra, U.S. at 542.

Criminal defendants have often carried this burden by arguing in a particular case that only by affording such a remedy can the Court correct unconstitutional practices that have received widespread endorsement from the lower courts and, at the same time, avoid the problem of rendering an advisory opinion that runs afoul of the "case or controversy" requirement of Article [*44] III of the Constitution. See, e.g., Stovall v. Denno, supra, 388 U.S. at 300-301. [14] Here, however, because of the intervening decision in Payton, this justification for application of the exclusionary rule does not exist. The continuing validity of Cravero is, at a minimum, called into question as a result of Payton, and it is by no means certain how the Fifht Circuit would decide the issue today. Indeed, if petitioner is correct about the implications of Payton, then the governing constitutional standard has already been established, and there is no need to invalidate petitioner's conviction in order to accomplish that end.

On the other hand, even if petitioner is incorrect about the significance of Payton, and substantial constitutional question regarding entries into third- party dwellings [*45] remains open after that decision, the Court can safely forgo This opportunity to answer that question withour running any risk that the matter will indefinitely evade judicial review. Payton represents an important development in Fourth Amendment law. In choosing a vehicle in which to explore the legal ramifications of that development (and, by hypothesis, to apply the exclusionary rule if police behavior does not satisfy constitutional standards), the Court should await a case in which the kind of entry that occurred here is repeated after Payton. By following this procedure, the Court will be able effectively to resolve any remaining constitutional question and, at the same time, to achieve the salutary result of avoiding suppression of relevant evidence until presented with a case in which the police conduct occurred after this Court had already given notice that the rule of Cravero may no longer be good law.

Accordingly, unless the rule adopted in payton is to be given retroactive effect, we believe that suppression of the challenged evidence is enappropriate in the instant case. We now turn, therefore, to the retroactivity question.

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[14] It is presumably for this reason that the Court in Payton did not embrace the State's argument that the Challenged evidence should not be suppressed because it had been seized in good faith reliance on a state statute that authorized warrantless entries into a suspect's dwelling to effect an arrest supported by probable cause. See 78-5420 Br. for Appellee 81-91.

This Court's past decisions concerning [*46] the retroactivity of constitutional rules of criminal procedure establish that Payton should not ve applied retroactively. In Stovall v. Denno, supra, 388 U.S. at 297, the Court indetified three criteria that guide the resolution of retroactivity questions. They are "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Application of these criteria demonstrate that Payton should not be given reroactive effects. Payton involved application of the exclusionary rule. See 445 U.S. at 591-592. The principal purpose of the exclusionary rule is to deter unlawful police conduct. Stone v. Powell, 428 U.S. 465, 486 (1976). The rule "is not calculated to redress the injury to the privacy of the victim of the search or seizure, for any '[r]eparation comes too late.'" Ibid., quoting from Linkletter v. Walker, 381 U.S. 618, 637 (1965). See United States v. Janis, 428 U.S. 433, 443 (1976);Desist v. United States, 394 U.S 244, 249 (1969). [*47] Rather, the rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect." United States v. Calandra, 414 U.S. 338, 348 (1974). No possible deterrent purpose would be served in this case by giving retroactive effect to the decision in Payton and thus excluding the fruits of searches and seizures that the police did not know and cold not reasonably be charged with knowing, were proscrived by the Fourth Amendment. See United States v. Peltier, supra, 422 U.S. at 542;Michigan v. Tucker, 417 U.S. 433, 447 (1974).

Although the exclusionary rule also has been described as serving the imperative of judicial integrity, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the rule in a particular context. Stone v. Powell, supra, 428 U.S. at 485. The introduction at trial of highly probative evidence seized in the course of a search and seizure that violates the Fourth Amendment does not impair the truth-finding function of the criminal trial. [T]here is no likelihood of unreliability or ceorcion present in a search- [*48] and-seizure case; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt,' and 'the fairness of the trial is not under attack.'" Desist v. United States, supra, 394 U.S. at 250, quoting from Linkletter v. Walker, supra, 381 U.S. at 638, 639. Thus, as the Court remarked in United States v. Peltier, supra, "the imperative of judicial integrity' is * * * not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution." 422 U.S. at 537- 538 (emphasis in original).

There is even less reason for retroactive application here than in other cases in which the Court has ruled that a new Fourth Amendment standard should be applied prospectively only. For example, in Linkletter v. Walker, supra, the Court refused to apply retroactively its decision in Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the Fourth Amendment's exclusionary rule was applicable in state [*49] criminal trials), despite the fact that the police in Linkletter (and in other pre-Mapp cases) could have entertained no doubts that their conduct was prohibited by the Fourth Amendment. See United States v. Peltier, supra, 422 U.S. at 538. Likewise, in United States v. Peltier, Supra, the Court did not give retroactive effect to its decision in Almeida-Sanchez v. United States, supra, even though the search in Peltier (and in similar cases preceding Almeida-Sanchez) was conducted without either a warrant or probable cause. Here, in contrast, prior to the decision in Payton law enforcement officers who sought to arrest a person inside his home were required to have both probable cause to believe that the person had committed a crime and reason to believe that the person was inside the presimes. The rule in Payton was not designed to deter either deliberate Fourt Amendment violations, as in Mapp, or the failure to comply with the Amendment's probable cause requirement, as in Almeida-Sanchez. Rather, Payton simply imposed a warrant requirement upon officers whose actions in all other respects complied with the standards of the Fourth Amendment. [*50]

The second factor -- the extent of reliance by law enforcement authorities on the old rule -- also militates stongly in favor of applying Payton prospectively. While the Court prior to Payton had referred to the constitutionality of warrantless arrest entries as an open question, the decision in Payton referred to the practice as "longstanding" and "widespread" (445 U.S. at 600) and specifically acknowledged that "[a] majority of the States that have taken a position on the question permit warrantless entry into the home to arrest even in the absence of exigent circumstances." Id. at 598. There is thus no reason to doubt that before Payton officers in a substantial number of

jurisdictions conducted warrantless entries to arrest in justifiable reliance on then-prevailing statutory or constitutional norms.

Finally, the third factor -- the burden on the administration of justice that would flow from retroactive application -- also supports the conclusion that Payton should not be given full retroactive application. Because the practice was "longstanding" and "widespread," it is safe to assume that a large number of convictions resulting from seizures [*51] of incriminating evidence made in the course of warrantless entries to arrest would have to be set aside if Payton were applied retroactively. [15] Moreover, reversal would be required in these cases despite the fact that the exclusion of reliable evidence will impair rather than aid the truth-finding process. See Stone v. Powell, supra, 428 U.S. at 490-491;United States v. Janis, supra, 428 U.S. at 448-449.

In United States v. Corcoine, 592 F.2d 111, 118 (2d Cir.), cert. denied, 440 U.S. 975 (1979), the Second Circuit refused to apply retroactively its decision in United States v. Reed, 572 F.2d 412 (2d Cir.), cert. denied, 439 U.S. 913 (1978), which had anticipated this Court's decision in Payton. [16] See also People v. Ramey, 16 Cal.3d 263, 276 n.7, cert denied, 429 U.S. 929 (1976). The court in Corcione noted that it [*52] was unnecessary to decide whether Reed was distinguishable on its facts, [17] since it concluded that the deterrent purpose of the exclusionary rule would not be served "where police officers obtained the evidence in good faith prior to the announcement of the new constitutional principle." 592 F.2d at 118. [18]
[*53]

In this case, the DEA agents acted in good faith reliance on prevailing Fifth Circuit precedent and had no reason to conform their actions to rules that would not be laid down until this Court's decision two years later in Payton. Until law enforcement officers may be changed with acknowledge of the Payton decision, the exclusionary rule should not be applied automatically to suppress evidence seized in the course of warrantless entries into a home to execute an arrest, so long as the police had probable cause to believe that the suspect committed a felony and reason to believe that he was inside the premises.

III. THE FOURTH AMENDMENT DOES NOT REQUIRE LAW ENFORCEMENT OFFICERS TO OBTAIN A SEARCH WARRANT PRIOR TO ENTERING THE RESIDENCE OF A THIRD PARTY IN ORDER TO EXECUTE AN ARREST WARRANT FOR A FUGITIVE WHOM THE OFFICERS HAVE REASON TO BELIEVE IS PRESENT

This Court in Payton recognized that police entries into the home for the purpose of making an arrest, like entries to search for contraband or evidence of crime, involve a substantial invasion of the individual's interest in the privacy of his dwelling. Accordingly, the Court held that, in the absence of exigent circumstances [*54] or consent, the Fourth Amendment requires the police to obtain a warrant before entering a house for the purpose of effecting an arrest. The Court, however, expressly rejected the suggestion that the Constitution requires "a search warrant based on probable cause to believe the suspect is at home at a given time." 445 U.S. at 602. While acknowledging that "an arrest warrant requirement may afford less protection than a search warrant requirement," the Court nevertheless explained that an arrest warrant requirement is sufficient for Fourth Amendment purposes because it

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[15] Even if relatively few convictions would be affected by retroactive application of Payton the deterrent purpose of the Payton rule is itself sufficient to compel nonretroactivity. SeeDesist v. United States, supra, 394 U.S. at 251-252.

[16] Reed was cited approvingly by this Court inPayton. 445 U.S. at 588-589.

[17] The defendant in Corcione had been arrested on a landing outside his own apartment but inside a two-family house owned by another individual.592 F.2d at 114, 118.

[18] In United States v. Blake, No. 79-1078 (9th Cir. Aug. 7, 1980), the Ninth circuit held that its decision inUnited States v. Prescott, 581 F.2d 1343 (9th Cir. 1978),be applied retroactively. Prescott had held that, absent exigent circumstances, police must obtain a warrant before entering a dwelling to arrest a suspect.581 F.2d at 1350.court in Blake based its retroactivity holding solely on the conclusion that the decision in Prescott had been "clearly foreshadowed" by earlier Ninth circuit decisions, and found it unnecessary to decide or comment upon the possible retroactivity of Payton. United States v. Johnson, No. 77-3808 (9th Cir. Sept. 2, 1980), the Ninth Circuit, without discussing the retroactivity question, applied the principles announced in Payton to suppress evidence obtained in the course of a warrantless pre-Payton entry of a suspect's dwelling. The government has filed a petition for rehearing en banc raising the retroactivity issue, and that petition is still pending.

interposes "the magistrate's determination of probable cause between the zealous officer and the citizen. If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer to require him to open his doors to the officers of the law." Id. at 602-603.

Under Payton, therefore, an arrest warrant implicitly authorizes the police "to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." 445 U.S. at 603. The question presented in this case is whether a differents rule should apply -- e.e., whether a search [*55] warrant should be required -- when the person sought by the police and named in an arrest warrant is believed to be on the premises of a "third party" not named in the warrant. This question is one on which the lower courts have divided, both before and after Payton. [19] [*56]

Petitioner argues that the existence of an arrest warrant indicates only that the suspect has committed a crime, and that unless the magistrate also determines that there is probable cause to believe that the suspect is present in a third party's residence there is an insufficient bassi for intruding upon the substantial interest of that person in the privacy of his own home. Law enforcement officers ordinarily cannot enter a private place to search for things until a magistrate has issued a search warrant based on probable cause to believe not only that a crime has been committed but also that fruits, instrumentalities, or evidence of the crime will be found at the place to be searched. See Zurcher v. Stanford Daily, 436 U.S. 547, 554-559 (1978). Moreover, in Payton the Court concluded that entries into private premises to arrest an individual and entries to search for property both intrude upon the individual's right to privacy in his home. If a search warrant is needed before the police may enter a person's home to search for things, it arguably should be required to enter a person's home to search for a fugitive.

This argument is apparently logical, it finds [*57] some support in the Fourt Amendment policy considerations that were invoked to justify the decision in Payton, and it has the virtue of producing symmetry between the law of entry to conduct a search for thigns to be seized and the law of entry to conduct a search for persons to be seized. Cf. United States v. Watson, 423 U.S. 411, 427-430 (1976) (Powell, J., concurring). But we submit that the argument is not without its flaws. For one thing, it is contrary to historical precedent, and, for another, it ignores the differences

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[19] Five circuits have taken the position that the police may enter a third party's residence to execute an arrest warrant, so long as they have probable cause to believe that the suspect is on the premises. See United States v. Manley, No. 79-1428 (2d Cir. Sept. 15, 1980), slip op. 5580 (dictum), petition for cert. pending sub nom. williams v. United States, No. 80-762;United States v. Cravero, 545 F.2d 406, 421 (5th Cir. 1976),denied,429 U.S. 1100, 430 U.S. 983 (1977);United States v. James, 528 F.2d 999, 1017Cir.), cert. denied,429 U.S. 959 (1976);Rodriguez v. Jones, 473 F.2d 599, 605-606Cir.), cert. denied,412 U.S. 953 (1973);United States v. Harper, 550 F.2d 610, 613-614Cir.), cert denied,434 U.S. 837 (1977);United States v. Brown, 467 F.2d 419, 423 (D.C. Cir. 1972);cf. United States v. Ford, 553, F.2d 146, 159 n.45 (D.C. Cir. 1977) (dictum). Three courts of appeals appear to require a search warrant, except when exigent circumstances are present. SeeGovernment of Virgin Islands v. Gereau, 502 F.2d 914, 928 (3d Cir. 1974),denied,420 U.S. 909 (1975);Fisher v. Volz, 496 F.2d 333, 338-343 (3d Cir. 1974);v.King, 626 F.2d 1157 (4th Cir. 1980),for cert. pending, No. 80-503;United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978)distingushing between arrests inside the suspect's home or inside the home of a third pary, the court held that the warrant must describe the place to be searched). Two other Courts have left the question open.United States V. Adams, 621 F.2d 41, 44 n.7 (1st Cir. 1980);Rice v. Wolff, 513 F.2d 1280, 1291- 1292 n.7 (8th Cir. 1975),on other grounds sub nom.Stone V. Powell, 428 U.S. 465 (1976).

Several state court decisions uphold the power of the police to enter a third party's residence on the authority of an arrest warrant. See State V. Jordan, 288 Or. 391, 605 P.2d 646, 648-651 (1980): Hocker V. Woody, 26 WAsh. App. 393. 613 P.2d 1183, 1186-1187 (1980); Anderson V. Superior Court of Stanislaus City, 105 Cal. App. 3d 264, 164 Cal. Rptr. 290, 294 (1980); Commonwealth V. State, 302 So.2d 254, 260 (miss. 1974), cert. denied, 421 Norman V. State, 302 So.2d 254, 260 (Miss. 1974), cert. denied, 421 U.S. 966 (1975). Contra, England V. State, 488 P.2d 1347 (Okla. Ct. Crim. App. 1971) (court held that search warrant was required, but did not specify whether requirement was imposed by the Fourth Amendment or by state law).

The commentators are also divided on the question. See Mascolo, Arrest Warrants and Search Warrants: The Seizure of A Suspect in the Home of A Third Party, 54 Conn. B.J. 299 (1980); 2 W. LaFave, Search and Seizure A Treatise on the Fourth Amendment 384-385 (1978). See also Note, The Constitutionality of Warrantless Home Arrests, 78 Colum. L. Rev. 1550, 1566 n.110 (1978); Rotenberg & Tanzer, Searching for the Person to be Seized, 35 Ohio StL L.J. 56, 67-71 (1971); Note, The Neglected Fourth Amendment Problem in Arrest Entries, 23 Stan. L. Rev. 995-997-999 (1971).

between persons and "things" and the considerable practical difficulties that a search warrant requirement would entail.

A. At Common Law, A Constable Was Authorized To Enter A Third Party's Dwelling to Execute An Arrest Warrant

As the Court noted in Payton, "examination of the common-law understanding of an officer's authority to arrest sheds light on * * * what the Framers of the [Fourth] Amendment might hae thought to be reasonable." 445 U.S. at 591. After surveying the common law authorities, the court in Payton concluded the the commentators were in sharp disagreement on the question whether a constable had the authority [*58] to make warrantless arrests in the home on mere suspicion of a felony. Id. at 592-596. There was no such divergence of views, however, with respect to the authority of the constable to enter any house in order to execute an arrest warrant. See Mascolo, Arrest Warrants and Search Warrants: The Seizure of A Suspect in the Home of A Third Party, 54 Conn. B.J. 299, 304-306 (1980); Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 801-802 (1924).

"Concealment of crime has been condemned throughout our history." Roberts v. United States, 445 U.S. 552, 557 (1980). The common law recognized the citizen's affirmative duty "to raise the 'hue and cry' and report felonies to the autorities." Branzburg v. Hayes, 408 U.S. 665, 696 (1972). [20] In addition, citizens were required, upon demand, to assist the constable in the. apprehension of a felon. 1 M. Hale, Pleas of the Crown 588 (1736); 2 W. Hawkings, Pleas of the Crown 116 (6th ed. 1787). [21]
[*59]

In light of the strong public interest in the apprehension of felons, the common law -- while sensitive to the individual's interest in maintaining the privacy of his home -- permitted law officers to intrude upon that privacy interest when executing a warrant to arrest a suspect for a felony, so logn as they had reason to believe that the person named in the warrant was present on the premises See Kelsy v. Wright, 1 Root 83, 84 (Conn. 1783). In Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (K.B. 1603), the Kings Bench, while acknowledging that "the hosue of everyone is to him as his castle and fortress" (5 Co. Rep. at 91a, 77 eng. Rep. at 195), concluded:

[T]he house of any one is not a castle or privilege but for himself, and shall not extended to protect any person who flies to his house, or the goods of any other which are brought and conveyed into his house, to prevent a lawful execution, and to escape the ordinary process of law; for the privilege of his house extends only to him and his family, and to his own proper goods, or to those which are lawfully and without fraud and covin there; and therefore in such cases after denial on request made, [*60] the sheriff may break the house.

5. Co. Rep. at 93a, 77 Eng. Rep. at 198. See also Johnson v. Leigh, 6 Taunt. Rep. 246, 248 (C.P. 1815); ZSheers v. Brooks, 2 H. Black. Rep. 120, 122 (C.P. 1792).

The common alw commentators appear to have agreed that an officer executing an arrest warrant for a fugitive could forcibly break open the doors of any house after giving notice of his authority and purpose and demanding entry. While Coke took the position that a warrant issued by a justice of the peace on bare surmise could not authorize the breaking of doors of any person's hose to effect an arrest, he expressed the view that in executing the King's writ after the return of an indictment, the sheriff "may demand the party indicted to be delivered; and that not done, he may break open the house, &c. and apprehend the felon * * *". 4 E. Coke, Institutes 177 (1764). See 2 W. Hawkins, supra, at 138. Hale was of the opinion that even if the suspect had not been indicted. the officer executing an arrest warrant for a felony "may break open the door, if he be sure the offender is there, if after

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[20] That duty is still recognized today. See18 U.S.C. 4of felony).

[21] This requirement has been codified in some states. E.g., Ga. Code Ann. § 27-206 (1978) ("Every officer is bound to execute the penal warrants placed in his hands, and to that end, he may summon to his assistance, either in writing or verbally, any of the citizens of the neighborhood or counry. As a posse of such officer, their acts shall be subject to the same protection and consequences as official acts.").

acquainting them of the business, and demanding the prisoner, he refuses [*61] to open the door * * *." 1 M. Hale, supra, at 581. See also 4 W. Blackstone, Commentaries 292. [22]

In sum, while "'the freedom of one's hosue' was one of the most vital elements of English liberty" (Payton v. New York, supra, 445 U.S. at 597; footnote omitted), the home "was never perceived at the common law as a privileged sanctuary for suspected felons so as to defeat or obstruct the execution of the crown's procss." Mascolo, supra, 54 Conn. B.J. at 305-306. In view of this historical background, it seems unlikely that the Framers intended to invalidate the settled authority of law officers to enter private premises, including [*62] those of a third party, in order to execute an arrest warrant for a felon.

B. There Are Significant Differences Between Persons And Things And Substantial Practical Difficulties of Imposing A Search Warrant Requirement On Officers Seeking To Execute An Arrest Warrant On The Premises Of A Third Party

Relying on Payton, petitioner argues (Pet. Br. 14, 18, 28-29, 32-36) tha while an arrest warrant coupled with reason to believe that the suspect is present is sufficient to authorize entry into a suspect's home to arrest him, something more -- i.e., a search warrant -- is needed to justify an entry into someone else's dwelling for the purpose of effecting an arrest. We do not doubt that the decision in Payton has substantially altered the law governing arrest entries and therefore shed important new light on the issue in the present case -- indeed, that is the burden of our argument in the preceding section of this brief. Payton does not, however, conclusively resolve the present issue.

We note initially that the government's interest in apprehending felons is the same, regardless whether the felon is present at his own or another person's house. In addition, although the intrusion [*63] that accompanies an arrest entry is not be minimized, an arprotectiosn to the homeowner's privacy interests that a search warrant requirement would. [23] Indeed, the Court recognized as much in Payton.

Most importantly, "[a]n arrest warrant is validly issued only when a magistrate is convinced that there is probable [*64] cause to believe that the named party has committed an offense." United States v. McKinney, 379 F.2d 259, 263 (6th Cir. 1967). Thus, an arrest warrant requirement interposes "the Magistrate's determination of probable cause between the zealous officer and the citizen." Payton V. New York, supra, 445 U.S. at 602.

Moreover, the existence of an arrest warrant assures the occupants that the officer is present on official business. And, by specifying the person to be arrested, the warrant indicates that the officer has legitimate reason to inquire whether the person named in the warrant is inside the premises. Cf. Camara v. Municipal Court, 387 U.S. 523, 532 (1967). If the suspect is in fact inside, he may voluntarily surrender at the door, in which case no search of the premises will be necessary. See Payton v. New York, supra, 445 U.S. at 617 (White, J., dissenting).

Unlike a search warrant, an arrest warrant merely named the person to be seized but does not specify the premises to be searched. Thus, an arrest warrant requirement does not provide for a pre-entry determination by the magistrate that there is reason to believe [*65] that the suspect is present inside the premises to which entry is sought. That determination is left to the officer executing the arrest warrant. The officer's determination of reason to

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[22] Blackstone noted that "[a] general warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for it suncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion." 4 W. Blackstone, supra, at 291 (emphasis in original). While the person to be seized had to be named in the arrest warrant, there was no requirement that the place or places to be searched for the suspect had to be particularly described.

[23] We note thatRule 41(b)(4) of the Federal Rules of Criminal Procedure provides for the issuance of a warant to search for and seize "any * * * person for whose arrest there is probable cause * * *." This provision does not reflect a belief that a search warrant is constitutionally required to arrest a suspect in a private place. The Advisory Committee noted that some circuits require a search warrant in particular circumstances, and that the law is in a sufficient state of uncertainty to justify an express provision permitting the issuance of a search warrant for persons subject to arrest on probable cause. Although the ALI Model Code of Pre-Arraignment Procedure § 210.3(1)(d) (Proposed Official Draft 1975) contains a similar provision, the Commentatros explicitly rejected the position that the provision was required by the Fourt Amendment. Id. at 506-507.

believe is, however, subject to subsequent judicial review. Cf. Dalia v. United States, 441 U.S. 238, 258 (1979). If the officer does not have sufficient reason to believe that the suspect is present at the time he enters the premises of a thrid party, any evidentiary fruits of that entry will a third party, any evidentiary fruits of that entry will be suppressed from use at trial against anyoe with a legitimate expectation of privacy in the premises. In addition, if the officer violates the Foruth Amendment rights of the occupants by entering without reason to believe that the named suspect is present, he may be subject to a cause of action in damages for that violation. See Bivens v. Six Unknown Federal Narcotics Agents, 403. U.S. 388 (1971). A post-entry judicial exploration of the officer's reason to believe -- like the similar post-entry remedies in Dalia and Payton -- goes far toward protecting the third party's privacy interests.

While the protections afforded by an arrest [*66] warrant are substantial, we recognize that several considerations exist that could justify requiring a search warrant to seek a felon in another person's home, while not requiring such a warrant to search for him at his own home: (1) there is such an inherently greater likelihood that the suspect will be found at his own home than at another's that a magistrate's determination is unnecessary in the former but arguably is needed in the latter situation; (2) the potential for abuse is much less if the implicit entry authorization of an arrest warrant is confined to the suspect's own residence and is not held to make the police free to search for the suspect in anyone else's house without obtaining a particularized judicial determination that the suspect is present; and (3) an arrest warrant may be thought to have some of the undesirable attributes of a general warrant if it authorizes entry into third party premises, but it obviously presents no such problem in the case of the suspect's own premises.

We acknowledged that the interposition of a magistrate to make the determination of the suspect's presence may provide additional protection to the privacy interests of the occupants of [*67] third pary premises. But the question remains whether the margin of difference is sufficiently significant to render unreasonable an entry of a third party's residence in the absence of a search warrant. The answer to this question, we believe, rests on the decision whether the increased margin of protection to privacy interests outweighs the practical handicaps to law enforcement that would be required to achieve that margin. Cf. Brown v. Texas, 443 U.S. 47, 50-51 (1979).

The principal problem that weighs agaisnt a search warrant requirement in the context of a search for a person is the inherent mobility of the suspect. See United States v. McKinney, supra, 379 F.2d at 263. It is settled that the police may enter any dwelling without any warrant when they are in hot pursuit of a suspect or when there are other exigent circumstances. United States v. Santan, 427 U.S. 38 (1976);Warden v. Hayden, 387 U.S. 294 (1967);Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (en bacn). But even where there is no specific exigency, it is often impractical to require that officers -- having previously obtained an arrest [*68] warrant -- return to the magistrate to demonstrate that they have reason to believe the suspect is within the premises of a third party. [24] People -- particularly people suspected of crime -- are mobile. A fugitive is likely to move as inconspicuously as possible and will rarely return home if he knows the police are looking for him and he desires to avoid apprehension.

Physical evidence does not move about with the same frequency that persons do, and it never [*69] moves about as a result of its own volition, instinct or suspicion. Moreover, criminals usually do not carry contraband or incriminating evidence on their person as a means of concealing those items from the police. Instead, they are far more likely to conceal the goods at a particular location. See, e.g., United States v Rahn, 511 F.2d 290, 293-294 (10th cir.), cert. denied, 423 U.S. 825 (1975);United States v. Lucarz, 40 F.2d 1051, 1055 (9th Cir. 1970). The fact that a house appears to be momentarily unoccupied thus does not diminish the probable cause to believe that physical evidence will be found within.

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[24] In theory, under petitioner's argument, only one warrant -- a search warrant particularly describing the place to be searched -- is necessary to authorize entry into third party premises to arrest a person whom the authorities hace probable cause to believe committed a crime. SeeFed. R. Crim. P. 41(b)(4). In practice, however, the police are likely to begin their search for the suspect at his own residence. Under Payton, they must secure an arrest warrant before entering the suspect's home. If he is not there, the police will then have to return to the magistrate for a new search warrant each time they receive information constituting reason to believe that the suspect is located at someone else's house.

In contrast, a search warrant for a fugitive may be an empty gesture because the information on which it is based may be stale at the time the warrant is issued, or shortly thereafter. Thus, a search warrant requirement may result in numerous futile trips to the magistrate, since each time the suspect changes his location the polica will have to seek a new warrant. It may be that law enforcement officers could avert escapes by placing suspects under "house arrest" while a warant is being sought, but that course, too, has its dangers. [*70] It might chill the rights of other persons inside the premises to move freely about. Further, upon learning of his "house arrest," the suspect could arm himself and endanger the lives of the officers when they eventually attempt to make the arrest. [25]
[*71]

Finally, apart from the problems posed by the inherent mobility of the suspect, there is one additional factor that militates against imposition of a search warrant requirement. It may be difficult, if not impossible, for the police to ascertain with any degree of certainty the realtionship between the suspect and the premises where the suspect is believed to be located. Thus, the police may have highly reliable information that the suspect was seen entering a certain residence, but they may not know whether the suspect has been residing there for a considerable lenght of time, or whether he is merely visiting the residence for several minutes. If the suspect has been living at the premises, presumably an arrest has been warrant coupled with reason to believe that he is there will suffice to justify an entry, even though the premises are owned by a third party and others are living there. If the suspect is a mere visitor, under the rule petitioners urge the police would have to procure a search warant prior to entry. Of course, if the suspect is merely visiting the premises, there is an increasing likelihood that he will no longer be there when the agnets return from the magistrate [*72] with a search warrant. In any event, it is debatable whether the police should be placed in the position of having to guess at their peril whether the suspect has sufficient connection to the premises to justify entry armed only with an arrest warrnt.

The crux of our argument is that the Fourth Amendment requires only that official actions be reasonable, and that arrest entries, as a class, should be presumptively reasonable if a magistrate ha issued an arrest warrant on probable cause to believe that an individual has committed a crime, and the officers have good grounds to believe that the person named in the warrant is inside. It is possible that the police may err in some cases in their determination of reason to believe that a suspect is within particular premises. While the issue is a close one, it seems to us that the possibility that some arrest entries will be unreasonable is not a sufficient justification for requiring search warrants prior to all arrest entries in third party dwellings, particularly in view of the extent to which a contrary ruling would depart from the historical understanding and the intentions of the Framers in adopting the Fourth Amendment.

Because [*73] of the crucial differences between people and things, we submit that if the Court does decide to impose a search warrant requirement for arrest entries into third party premises, it would be appropriate an necessary to recognize that the concept of exigent circumstances permitting entry without a search warrant may be different wher the object of the search is a person than when it is simply a piece of tangible evidence. See Warden v. Hayden, supra, 387 U.S. at 298-300.

For example, if the police observe the delivery of a package that they know contains stolen property or narcotics to a particular address, they would -- absent additional information suggesting that the evidence will disappear if they do not act quickly -- be required to secure a search warrant in order to enter the premises and search for the package. But where the officers see a fugitive enter a residence, it may be reasonable for them to make an immediate arrest entry if they have no knowledge of the suspect's connection tot eh premises and no idea how long he is likely to remain there. Prompt action would be especially appropriate if, as in the present case, the subject of

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[25] Of course, in those cases where the police can be assured that the suspect will remain at a particular location for a sufficiently lengthy period of time and that their physical safety will not be endangered by delaying entry, the burden of requiring them to obtain either a conventional or a telephonic search warrant is not great. SeeFed. R. Crim. P. 41(c)(1) and (2). Indeed, the purpose of including a telephonic warrant provision in the Federal Rules of Criminal Procedure was to provide a means for federal law enforcement officers to procure a search warrant in the not infrequent situations "in which the circumstances are not sufficiently 'exigent' to justify the serious step of conducting a warrantless search of private premises, but yet there exists a significant possibility that critical evidence would be lost in the time it would take to obtain a search warrant by traditional means." S. Rep. No. 95- 354, 95th Cong., 1st Sess. 10-11 (1977).

an arrest warrant is [*74] a figitive who has been evading apprehension, if the officers believe him to be armed, and if the offense for which he is being sought is a serious one. [26]

While the adoption of a more flexible standard of exigency with respect to figitives might alleviate some of the [*75] difficulties encountered in making arrest entries at third party premises, we submit that these difficulties are likely to arise with sufficient frequency that the better course would be to hold that no search warrant is required provided an arrest warrant has been issued and the officers have reason to believe that the suspect is on the premises. The approach we urge is a clearer and simpler rule for law enforceemnt officers to apply. Moreover, it is consistent with the understanding of the Framers, and the arrest warrant itself provides substantial protection to the Fourth Amendment privacy interests that are implicated by such entries.

CONCLUSION

The judgment of the court of appeals should be affirmed; in the alternative, the Court may wish to remand the case for further proceedings with respect to petitioner's "standing" to raise the Fourth Amendment issue.

Respectfully submitted.

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APPENDIX [*] [*76]

Volume I -- Suppression Hearing Transcript

[86]

Q You wer here in court on the 18th, you say, is that correct?

A Yes Sir.

Q Magistrate's office was open, as far as you know? This Magistrate's office was open?

A As far as I know, yes.

Q You could have obtained a search warrant had you believed it necessary?

A Search warrant for what, sir?

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[26] InDorman v. United States, supra, the District of Columbia Circuit enumerated the following criteria as pertinent to a determination of exigent circumstances in making warrantless arrest entries: (1) the gravity of teh offense; (2) whether the suspect is reasonably believed to be armed; (3) whether there is probable cause to believe the suspect committed the crim; (4) whether there is reason to believe the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; (6) whether the entry is peaceable, or if force is used, whether the force was justified; and (7) the time of entry. 435 F.2d at 392- 393. While we do not necessarily endorse the "check-list" approach suggested in Dorman, we agree with its recognition that different standards should govern the determination fo exigency when the item sought is a person rather than a thing.

[*] The government designated this portion of the suppression hearing transcript for inclusion in the joint appendix. However, this item was omitted by counsel for petitioner, who was responsible for preparing the appendix in this case.

Q For the Search that you actually conducted, for going up to this place on Cary Court, this particular arrest. You could have gotten a search warrant. I'm saying it was physically possible to get it. Courts were open. You had the time, did you not?

A I don't know. A search warrant for what, sir? I had an arrest warrant.

Q I'm not, I don't want to quarrel with you on the law. I'm just asking physically, you had the opportunity had you believed it necessary, to obtain a search warrant to go up there to Cary court looking for Ricky Lyons? You could have done it, could you not? You had the time, did you not? You [87] wer at the place where you could have gotten it?

A Yes sir, I was here, yes sir, and I assume the Magistrate's office was open. But, I'm sorry, I don't understand the whole question.

Q My question [*77] is, had you chosen to do so, you coud have obtained a search warrant?

THE COURT: That's a legal question, too, Mr. horn, as to whether he could or could not have obtained one. You really want to know if he had the opportunity to present the facts that he knew about to a magistrate?

MR. HORN: Right. I don't mean to foreclose probable cause.

BY MR. HORN:

Q I j ust mean physically, had you chosen to do so, you could have prepared the papers and attempted to get a search warrant to go look for Ricky Lyons at Cary Court. Had you chosen to do so, you could have done that, could you not?

A As far as I know, physically, yes Sir

Q There were no exigent circumstances?

A That's a long word. To the physical hindrance, no sir.

Q Did you have any information as to how long Ricky Lyons would be at this premises?

A No sir.
